

KENNER LAW FIRM, P.C.
David E. Kenner, SBN 41425
Brett A. Greenfield, SBN 217343
16000 Ventura Boulevard, PH 1208
Encino, CA 91364
818 995 1195
818 475 5369 - fax

WADE, KELLY & SULLIVAN
733 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 561-7743
(907) 562-8977 - fax

Attorney for Defendant Josef F. Boehm

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Sally C. Purser,)	
Plaintiff,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES ON MOTION FOR
v.)	RECONSIDERATION RE: SUMMARY
)	JUDGMENT
Josef F. Boehm, Allen K.)	
Bolling, and Bambi Tyree,)	
)	
Defendants.)	
)	
)	CASE NO.: A05-0085 (JKS)

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Defendant Boehm requests that the court reconsider its order granting summary judgment on the issue of liability. Boehm has been acting under good faith and has tried diligently to provide the court with all necessary evidence to contest the claims of Plaintiff Purser.

On March 23, 2003, this court granted summary judgment regarding liability. The court reasoned that Purser had provided a

1 sworn statement which stated, "In exchange for the crack cocaine
2 that Mr. Boehm provided to me, he demanded that I perform sexual
3 acts on him, his male companions, as well as on other young girls
4 and woman [sic] for his self gratification." *Order Granting*
5 *Summary Judgment*, page 4.

6 The court held that these claims were not contested because
7 "Boehm has not filed an affidavit or submitted a deposition in
8 which he denies under oath that Sally Purser performed sexual acts
9 at his request in return for crack cocaine." *Id.* at 5. However,
10 the exact affidavit the court states is lacking was filed by
11 counsel in a supplemental brief.

12 Plaintiff Purser intentionally omitted affidavits, relied on
13 by this court, in her summary judgment motion. As a result,
14 Boehm's counsel was significantly hindered in obtaining a signed
15 affidavit from Boehm denying the claims in Purser's affidavits.

16 Defendant Boehm respectfully requests that the court
17 reconsider its decision of March 23, 2003, and deny summary
18 judgment on the issue of liability.
19

20 **II. Argument**

21 **A. Authority for motion for reconsideration.**

22 _____FRCP rule 59(e) provides that any motion to alter or amend a
23 judgment shall be filed no later than ten days after entry of the
24 judgment. Reconsideration of an order on a motion for summary
25 judgment is appropriate when (1) the court is presented with newly
26 discovered evidence; (2) the court committed clear error; (3) there
27 is an intervening change in controlling law; or (4) other highly
28

1 unusual circumstances exist. (emphasis mine). *Nail v. Brazoria*
2 *County Drainage Dist*, 992 F.Supp. 921, 925 (S.D. Tex. 1998).

3 **B. Plaintiff's deliberate withholding of affidavits severely**
4 **prejudiced Defendant Boehm. Because of Boehm's incarceration,**
5 **he was unable to properly respond creating a highly unusual**
6 **circumstance in which Boehm was denied his right to properly**
7 **deny Purser's claims.**

8 Plaintiff filed her Second Motion for Summary Judgment on
9 December 14, 2006. The Motion was filed without the attached
10 affidavits of Plaintiff and former defendant Bambi Tyree. Due to
11 her desire to have the affidavits filed under seal, Plaintiff
12 Purser omitted the affidavits. The affidavits were the sole
13 support for her Motion. Even without the inclusion of the
14 affidavits, the statutory period continued to run to the detriment
15 of Boehm.

16 Affidavits supporting summary judgment were not received by
17 Defense counsel until December 22, 2006 (*eight days after filing*).
18 Thus, denying defense counsel the opportunity to respond with a
19 signed affidavit from Boehm.

20 Plaintiff's counsel is well aware of the obstacles associated
21 with preparing paperwork and having it viewed by Boehm while
22 incarcerated. Mr. Boehm is incarcerated approximately 150 miles
23 away from defense counsel's office. In order for counsel to meet
24 with Mr. Boehm, they must spend upwards of five hours in driving
25 time and an hour of processing time to see Mr. Boehm for a few
26 hours per visit. Further, visiting hours are limited to two days
27
28

1 per week. This court has recognized these challenges in it
2 scheduling and planing order.

3 With this knowledge, Plaintiff's counsel intentionally filed
4 his motion for summary judgment while Defense counsel was in
5 Anchorage Alaska performing needed depositions. Defendant Boehm
6 was further prejudiced because the statutory response period
7 encompassed the Christmas and New Years Holidays making visits
8 extremely difficult.

9 The actions of Purser's counsel are, at best, questionable
10 and do not comport with notions of fair play.

11 **C. Defendant Boehm signed an affidavit denying all claims**
12 **made by Plaintiff Purser and Bambi Tyree.**

13 Boehm has created genuine disputes of material facts through
14 his signed January 15, 2006 affidavit. In this affidavit, Boehm
15 denied all claims made by Plaintiff Purser and Bambi Tyree.
16 Boehm's affidavit is attached and marked Exhibit A. This affidavit
17 was included in a supplemental motion to Boehm's Opposition to
18 Summary Judgment. Docket No. 152. This supplemental motion was
19 denied because the court ruled that this evidence was available at
20 the time of the filing of the first motion in opposition to summary
21 judgment. Although the affidavit was technically available, it was
22 constructively impossible to obtain through due diligence of
23 Defense Counsel because of Plaintiff Counsel's actions mentioned
24 above.

25 Boehm's January 15, 2006 affidavit should be considered by
26 this court.

1 **D. Boehm denied all claims made by Plaintiff Purser in his**
2 **discovery responses.**

3 Boehm has created genuine disputes of material facts through
4 his responses to discovery requests. Although this court has ruled
5 that mere denials under oath in conclusory terms of requests for
6 admission is not equivalent of an affidavit, Boehm should be
7 allowed in this situation to rely on the denials in the discovery
8 requests.

9 Defendant Boehm was not allowed the full amount of time to
10 respond to Plaintiff Purser's accusations because of the willful,
11 deliberate, and questionable actions of Purser's attorney. Thus,
12 an unusual circumstance exists where Boehm should be allowed to
13 rely on his responses to Purser's discovery requests to create
14 genuine disputes of material facts.

15
16 **III. Conclusion**

17 Plaintiff Purser should not be allowed to withhold
18 affidavits, knowing that it will severely prejudice Defendant
19 Boehm, and then submit them at the eleventh hour. For the
20 aforementioned reasons, Defendant Boehm respectfully requests this
21 court reconsider its March 23, 2007 ruling and deny summary
22 judgment.

1 DATED this 4th day of April, 2007 at Encino, California.

2
3 KENNER LAW FIRM

4 By: _____/s/_____
5 David E. Kenner
6 California 41425
7 16000 Ventura Blvd.
8 Penthouse 1208
9 Encino, California 91436
10 Telephone: (818) 995-1195

11 By: _____/s/_____
12 Brett A. Greenfield
13 California 217343
14 16000 Ventura Blvd.
15 Penthouse 1208
16 Encino, California 91436
17 Telephone: (818) 995-1195

18 _____